(1)

NO. 90-266

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

HUGHES BRAILEY, pro se,

Petitioner-Appellant,

vs.

JENNY ALDERMAN, Superintendent,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 28, 1990

A.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit in Habeas Corpus Appeal No. 89-1480 has rendered a decision in conflict with the decision of another Federal court of appeals on the same matter, and has so far departed from the accepted and usual course of judicial proceedings by sanctioning such departure by the U.S. District Court, so as to warrant and call for an exercise of the U.S. Supreme Court's discretionary power and duty under law of supervision.

2. Whether Habeas Corpus Petitioner Hughes Brailey has exhausted available, adequate State court remedies by way of his direct appeal from the unfit to stand trial order which is statutorily designated as a final order for purposes of appeal.

3. Whether trial in the first instance for guilt of an administrative crime occurs/ has occurred at the quasi-judicial administrative level.

4. Whether the Illinois Department of Revenue and the State enforcement court has jurisdiction over the person of Petitioner Brailey who is a natural unenfranchised person under the common law.

5. Whether the administrative criminal sanction is VOID.

6. Whether the "trial"-enforcement court of the State has committed an abuse of process by refusing Petitioner Brailey judicial review.

7. Whether Petitioner-Appellant Brailey's right to representation among others has been violated by public defenders forcibly appointed upon him.

8. Whether Petitioner-Appellant Brailey at present continues to be in custody of the State of Illinois in violation of

the Constitution, and threatened with additional future adverse unlawful-unConstitutional consequences, whereby he is entitled as a matter of Constitutional-common law right to issuance of the Writ of Habeas Corpus and accompanying appropriate relief.

9. Whether the U.S. Court of Appeals for the Seventh Circuit has a duty under law to redress-rectify the wrongs of the U.S. District Court alleged by Petitioner-Appellant Brailey.

B.

PARTIES

1. The U.S. District Court for the Northern District of Illinois, Eastern Division, of Judge Marvin E. Aspen.

2. Jenny Alderman, Superintendent of the Elgin Mental Health Center of the Illinois Department of Mental Health & Developemental Disabilities of the State of Illinois.

3. The Illinois Appellate Court, First Judicial District, Fourth Division: Hon. Mel R. Jiganti, Hon. David Linn, Hon. Mary McMorrow, presiding judges.

4. The Illinois Supreme Court.

5. The Cook County Circuit Court, Criminal Division, of Judge Joseph Urso, who during the course of Petitioner Brailey's Habeas Corpus Appeal in the U.S. Court of Appeals, recused himself and the State enforcement case was transferred to Judge Daniel Kelley of the Cook County

Circuit Court, Criminal Division.

6. The Illinois Department of Revenue, Director-Chief Administrative Law Judge thereof: J. Thomas Johnson, and his successor, Roger Sweet.

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JURISDICTIONAL STATEMENT

The date of the final judgement of the U.S. Court of Appeals sought to be reviewed is: April 27, 1990. The time of its entry is: May 11, 1990.

The statutory provision believed by Petitioner Hughes Brailey to confer jurisdiction upon this Honorable Supreme Reviewing Court to review the judgement in question by writ of certiorari is Rule 10 of the U.S. Supreme Court Rules.

F.

CONSTITUTIONAL PROVISIONS

1. Article IV, Section 2.: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

2. 1st Amendment right to petition government for redress of grievances: "....the right of the people,.....to petition the government for a redress of grievances."

3. 4th Amendment right of privacy: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,....."

4. 5th Amendment right to due process and just compensation: "No person shall be .....deprived of life, liberty, or proper-

ty, without due process of law; nor shall private property be taken for public use, without just compensation."

5. 9th Amendment implied acknowledgement of inalienable rights and immunities residing in the common law and law merchant as being retained by the people, as inter alia, relates to non-liability/immunity to "income tax": "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

6. 13th Amendment right against involuntary servitude: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

7. 14th Amendment implied grant of extra common law U.S. Citizenship franchise, as relating to liability for "income" tax:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ....."

8. 16th Amendment clarification of the Constitutional power and authority of Congress to lay and collect taxes on incomes: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

G

STATEMENT OF THE CASE

Hughes Brailey petitioned the U.S. District Court of Judge Marvin Aspen for habeas corpus relief while in confinement at the Elgin Mental Health Center of the State of Illinois based on a State "trial" -enforcement court order of unfit to stand trial. The basis of Federal jurisdiction of the District Court is 28 U.S.C., § 2241 and § 2254. In his petition for writ of habeas corpus, Hughes Brailey alleged Constitutional grounds for the writ to issue of want of jurisdiction of the Illinois Department of Revenue and the State enforcement court over his person, the charge of failure to file an Illinois State Income Tax return being void, abuse of process by the State enforcement court, and conspiracy and misrepresentation by forcibly appointed public defenders. Brai-

ley also showed that he had raised said grounds on his appeal from the unfit to stand trial order up to the highest court of the State of Illinois, and in his Petitioner's Response And Objections To Respondent's Answer To The Petition And Motion To Dismiss, he showed that an order finding a defendant unfit is statutorily designated as a final order for purposes of appeal in the State of Illinois, and that in his individual case of being charged with an administratively decided criminal sanction, trial in the first instance for guilt thereof had already occurred at the quasi-judicial administrative level, notwithstanding the fact that the enforcement court of the State had not yet held "trial" prior to its unfit judgement. The U.S. District Court Judge did not make a determination of the merits of the grounds raised by petitioner Brailey, for in apparent agreement with the conten-

tions of Respondent Jenny Alderman, he dismissed the petition on February 22, 1989 for failure to exhaust state remedies and failure to show special circumstances to warrant pre-trial habeas corpus relief. Memorandum Opinion And Order- (Appendix pages a- 6 through a- 16). Habeas corpus petitioner Hughes Brailey then appealed said dismissal to the U.S. Court of Appeals for the Seventh Circuit on March 6, 1989, which Appeals Court on May 11, 1990 entered their order affirming the judgement of the District Court, and attached a copy of the District Court's Memorandum Opinion And Order to their own order as being in full accordance with their own opinion. (Appendix pages a- 1 through a- 16).

In his Petition For Writ Of Habeas Corpus, Hughes Brailey raised four grounds on which he held his confinement to be in violation of the Constitution, and presen-

ted supporting facts.

Ground 1 is: Want of jurisdiction of the trial-enforcement court/Illinois Department of Revenue over his person, based on the facts that months before being referred for indictment by the Illinois Department of Revenue for failure to file an Illinois income tax return, Brailey affirmatively, with verification/authorities, on the administrative record, pleaded and proved want of jurisdiction by the Department/Illinois Income Tax Act over his person, proving that the unenfranchised natural individual and his rights under the Constitution-common law such as labor and common law wages are not the object of State and Federal income tax, and that as a matter of law and fact he is not enfranchised, whereafter, the Department of Revenue defaulted on said issue of jurisdiction.

Ground 2 is: The charge of Ill. Rev.

Stat. chapt. 120, sect. 13-1301 is void, based on the facts, among others, that the Illinois Department of Revenue denied Brailey a formal hearing on the issue of jurisdiction, failed to make a prima facie case in support of their pretended jurisdiction and determine the individual Constitutional rights of Brailey, and denied him essential due process by failing to render judgement in his favor on the merits of his pleadings on the issue of jurisdiction, and then arbitrarily entered their final order in the contested case, for enforcement of their administrative criminal sanction.

Ground 3 is: Abuse of process by the "trial"-enforcement court of the State, based on the facts that when Brailey was brought before said enforcement court of Judge Joseph Urso, facing the charge of failure to file an Illinois income tax return, he petitioned said court for judi-

cial review of the quasi-judicial administrative procedure and adjudication which arbitrarily procured said charge as a final order in a contested case on the issue of jurisdiction. Judge Urso and the Illinois Attorney General, denying that administrative agencies have primary-original adjudicatory jurisdiction over agency issues and agency criminal sanctions-rules, denied Brailey judicial review.

Ground 4 is: Misrepresentation and conspiracy by forcibly appointed public defenders, based on the facts that after defendant Hughes Brailey was informed that Judge Urso does not allow anyone to plead pro se in his courtroom, the Judge then forcibly appointed public defenders upon him against his objections. Public defenders requested of said State Judge that Brailey be denied judicial review, while off the record admitting to knowing it to be proper procedure. Public Defenders dis-

honestly alleged that Brailey was "unable" to "cooperate" with "counsel", and with the perjured testimony of a "Dr. Markos", Brailey was found unfit to stand trial though he had no mental problem whatsoever.

Petitioner Hughes Brailey, after being told by State Judge Urso that appeal from an order of unfitness was not possible, discovered approximately one month beyond the 30 day statutory time limit for filing a notice of appeal from an unfit order that such was not true, and upon a motion for leave to file a late notice of appeal made before the Honorable Illinois Appellate Court, leave to appeal was granted by said Appellate Court, and thereby Brailey raised the grounds in his subsequent Federal habeas corpus petition before said Honorable State Appellate Court. Thereafter, the Illinois Appellate Court rendered an adverse decision affirming the enforce-

ment court decision of unfit to stand trial primarily based on the contention that appeal from an unfit order is an interlocutory appeal and thus only the issue of fitness can be raised on appeal therefrom, absence of enforcement court jurisdiction over the person of defendant notwithstanding, though on petition for rehearing before said Honorable Appellate Court, Brailey presented Ill. Rev. Stat. Chapt. 38, sect. 104-16(e) which unambiguously states: "An order finding the defendant unfit is a final order for purposes of appeal by the State or the defendant." The opinion/order of the Illinois Appellate Court can be seen at Appendix pages a- 17 through a- 25. Thereafter, Hughes Brailey petitioned the Illinois Supreme Court for leave to appeal, raising the same grounds as in the Federal habeas corpus petition, and was denied said leave.

When Brailey's appeal from the unfit

to stand trial order was commenced in the Illinois Appellate Court, he was out on bond, yet long before said Appellate Court divested itself of appellate jurisdiction in the appeal, Judge Urso of the State enforcement court, against the pleadings and objections of Brailey, had him committed to the Elgin Mental Health Center. Therefore, Hughes Brailey, while his appeal from the unfit for trial order was yet in progress and he was in confinement at Elgin Mental Health Center, petitioned the Illinois State Circuit and Supreme courts without success for State habeas corpus relief, based primarily on the ground that the order of commitment by Judge Urso was made unlawfully while the unfit for trial order was yet in progress, though it is statutorily designated as a final order of the enforcement court when appealed. Brailey also pointed out the fact that Illinois habeas corpus actions do not apply

to orders of commitment by force of a final order of any State circuit court, per Ill. Rev. Stat. chapt. 110, sect. 10-123-(3), but that the order of Judge Urso having him committed was not such a final order, but one in excess of the statutorily designated final order of the trial court on appeal of unfit to stand trial, which final order on appeal has no lawful force and effect in itself as a final order of the trial court on appeal to have a defendant-appellant admitted to bond on the appeal committed during the pendency of such appeal.

After the Illinois Supreme Court denied Hughes Brailey leave to appeal the decision of the Illinois Appellate Court affirming the unfit for trial order, he then decided that because of short financial ability that appeal to this U.S. Supreme Court from said State Supreme Court was impractical, and also because he read

case law on the matter which holds that Federal habeas corpus action starting at the Federal district court level is more desirable a course to follow in most cases seeking relief from unConstitutional State custodies, in that it provides local Federal courts an opportunity to redress said unConstitutional State custodies before redress is sought from this Highest Court of our Nation.

While on appeal from the final judgement of the U.S. District Court denying Petitioner Brailey habeas corpus relief, Brailey was released from confinement at the Elgin Mental Health Center and his custody was transferred back to the custody on bond of Cook County, Illinois Circuit Court Judge Joseph Urso who then recused himself from the case and arranged for its transfer to Cook County Circuit Court Judge Daniel Kelley, ostensibly for to hold trial for enforcement of failure

to file a State income tax return, yet at that time, though the Illinois Appellate Court had rendered its adverse ruling in the unfit for trial appeal, it had not terminated said appeal by filing a mandate in the Circuit Court. Petitioner-appellant Hughes Brailey, in/before the U.S. Court of Appeals for the Seventh Circuit, then motioned said Federal Appeals Court to allow for substitution of party and to stay the State court proceedings pending Federal habeas corpus appellate review of the U.S. District Court's denial of relief, both requests for relief which were denied. Brailey provided the U.S. Court of Appeals with case law indicating that even though he was out of confinement but yet out on bond, a person being out on bond is nonetheless considered "in custody" for purposes of being entitled to habeas corpus relief, thus countering any possible contention that the habeas corpus appeal had

been rendered moot. Brailey also showed authority stating that even though a petitioner is at large, their are considerations which preclude a reviewing court from dismissing a habeas corpus appeal on the ground of mootness, as where adverse legal consequences remain, and in Petitioner Brailey's case, such is indeed factual truth, for absent appropriate Federal relief, he shall certainly face additional unlawful State income tax actions depriving him of liberties guaranteed him under the Constitution, notwithstanding, a possible temporary release upon termination in the State courts of proceedings based on the present charge of failure to file.

Brailey was eventually convicted of failure to file a State income tax return by State judge Daniel Kelley in an unlawful de novo trial and is now out on bond on appeal before the very same Illinois Appellate Court, First District, Fourth

Division, which previously denied him any and all relief sought in his prior appeal from the unfit for trial order, ignoring jurisdictional and proceedural law and fact. Like Judge Urso, Judge Kelley completely ignored and denied Brailey's Constitutional rights including his 1st Amendment right of judicial review.

Hughes Brailey
HUGHES BRAILEY, pro se.

H.

ARGUMENT

1. The United States Court of Appeals for the Seventh Circuit in Habeas Corpus Appeal No. 89-1480 has rendered a decision in conflict with the decision of another Federal court of appeals on the same matter, and has so far departed from the accepted and usual course of judicial proceedings by sanctioning such departure by the District Court, that an exercise of the U.S. Supreme Court's discretionary power and duty under law of supervision is warranted and necessary.

In its apparent agreement with the decision of the U.S. District Court to dismiss the habeas corpus Petition, based on failure to exhaust State remedies and absence of extraordinary circumstances to warrant pre-trial habeas corpus relief, the

U.S. Court of Appeals for the Seventh Circuit has ignored the facts that habeas corpus Petitioner Hughes Brailey has met the requirement of exhaustion of State remedies by way of his direct appeal from the unfit for trial order of the State enforcement court, up to the highest court of the State, and that said unfit order is statutorily designated as a final order for purposes of appeal, and that trial in the first instance for guilt of the administrative criminal charge of failure to file a State income tax return already had occurred prior to entry of the unfit order, notwithstanding the fact that the State enforcement court had not yet held its unlawful de novo trial for enforcement of said charge.

> "The exhaustion doctrine does not require the filing of repetitious applications to the state courts. Accordingly, it is not required that resort be had to every available state remedy."

Alcorn v. Gladden, C.A.Or., 286 F.2d 689 -- U.S. ex rel. Alvarez v. Murphy, C.A.N.-Y., 246 F.2d 871 -- Gardella v. Field, D.-C.Cal., 291 F.Supp. 107.

> "The exhaustion of merely one of several alternative remedies is sufficient ."

Finetti v. Harris, C.A.N.Y., 609 F.2d 594 -- Hill v. Anderson, D.C.Mich., 492 F.-Supp. 930. -- Wade v. Mayo, Fla., 68 S.Ct. 1270, 334 U.S. 672, 92 L.Ed. 1647.

> "A habeas corpus petitioner whose claims have been properly presented to and considered by the highest court of the state to which resort may be had has exhausted his state remedies insofar as those claims are concerned."

Hendricks v. Swenson, C.A.Mo., 456 F.2d 503. -- Hughes v. Swenson, C.A.Mo., 452 F.2d 866.

The "discharge hearing" cited by the U.S. District Court, Appendix page a- 11, pursuant to Ill. Rev. Stat. chapt. 38, sect. 204-23, not only is not required of Petitioner Brailey to exhaust so as to meet the rule of exhaustion, but also it

is not an adequate remedy in that it only provides for discharge of a defendant and does not provide for lawful disposition-settlement of all the issues raised in his Petition for Federal habeas corpus as his appeal from the final order of unfit to stand trial does, and furthermore, the unfit order being a statutorily designated final order for purposes of appeal per Ill. Rev. Stat. chapt. 38, sect. 104-16-(e), had Brailey failed to raise his claims on appeal therefrom, it is safe to assume that the State of Illinois would have hypocritically properly argued that he had waived his right to appeal said grounds. Additionally, Illinois State habeas corpus is likewise not the proper and adequate remedy/forum for raising the claims in the Federal Petition as it bars a person from relief when in custody by virtue of a final judgement of any State circuit court, per Ill. Rev. Stat. chapt.

110, sect. 10-123(2).

Notwithstanding possible eventual temporary release from State custody, or the fact that Brailey may yet presently have opportunity to have certain claims adjudicated by the high State courts, though this certainly does not appear likely, he has a full Constitutional-common law right to have a determination made according to law of whether the specific confinement at the Elgin Mental Health Center was in violation of his Constitutional rights.

The Seventh Circuit U.S. Court of Appeals has disregarded the fact that numerous extraordinary circumstances exist in Petitioner Brailey's case, such as the fact that being charged with an administratively decided criminal sanction means that trial in the first instance for guilt thereof has already occurred long ago at the quasi-judicial administrative level, prior to entry of the abusive and fraudu-

lent unfit for trial order.

Another crucial extraordinary circumstance that said Court has ignored is absence of jurisdiction by the State of Illinois over the person of Hughes Brailey, and in the firm belief of Brailey, the only reason therefore is that said Court along with the high State courts believes that the issue of jurisdiction should be heard and settled according to law by this Highest Honorable Supreme Court of these United States.

2. Habeas Corpus Petitioner Hughes Brailey exhausted available, adequate State court remedies by way of his direct appeal from the unfit to stand trial order per aforementioned facts and argument.

3. Trial in the first instance for guilt of an administrative crime occurs/-has occurred, per aforementioned fact and argument, as a review of the State administrative record shall reveal.

4. The Illinois Department of Revenue and the State enforcement court does not have jurisdiction over the person of Hughes Brailey who is a natural unenfranchised person under the common law and is not the lawful object of nor subject to state and Federal income tax law, as a review of the State administrative record shall reveal. Upon receiving administrative notice and opportunity to contest the assertion of pretended jurisdiction by the Illinois Department of Revenue, Brailey filed his administrative pleadings/demand on the issue of jurisdiction which affirmatively, with verification/authorities, on the administrative record, pleaded and proved want of jurisdiction by said Agency over his person, and demanded a formal hearing on the issue of jurisdiction by said Agency whereby they would have the opportunity to counter the weight of evidence against them and to determine the

individual Constitutional rights of Brailey. In denying Brailey a formal hearing on the issue of jurisdiction and failing to counter the weight of evidence against them, and then entering their final order for enforcement of the charge of failure to file a State income tax return, they terminated the contested case on the issue of jurisdiction, and thus defaulted on said issue, yet failed to render according to law, summary judgement on the merits of Brailey's pleadings on the issue of jurisdiction, or in the alternative, default judgement, thus denying Brailey essential due process. Ill. Rev. Stat. chapt. 120, sect. 3-303(e)(1), in harmony with Brailey's administrative pleadings, confirms by express statutory reference that "income tax" is franchise tax.

5. The administrative criminal sanction Hughes Brailey is charged with is VOID for want of jurisdiction by the Illi-

nois Department of Revenue/Illinois Income Tax Act over his person and failure of said Agency to follow lawful procedure in a contested case at the administrative level which arbitrarily procured said charge. Ill. Rev. Stat. chapt. 127, sect. 1014, 2nd paragraph, states: "A decision by any agency in a contested case under this Act shall be void unless the proceedings are conducted in compliance with the provisions of this Act relating to contested cases....."

6. The enforcement court of the State has committed an abuse of process by refusing to judicially review the administrative record which arbitrarily procured the charge, as a review of the State record shall reveal.

7. Petitioner Brailey's right to representation among others has been violated by public defenders forcibly appointed upon him by the State enforcement court,

and who have sought to deny him his 1st Amendment right of judicial review, and to have him unlawfully incarcerated under false-fraudulent pretense, as a review of the State record shall reveal.

8. Petitioner-Appellant Hughes Brailey at present continues to be in custody of the State of Illinois in violation of the Constitution, and threatened with additional future adverse unlawful-unConstitutional consequences, whereby he is entitled as a matter of Constitutional-common law right to issuance of the Writ of Habeas Corpus and accompanying appropriate necessary relief. Presently, Brailey is out on bond pending appeal of the conviction for failure to file a State income tax return rendered by State enforcement court Judge Daniel Kelley who like Judge Urso completely ignored all jurisdictional and proceedural law and fact including Brailey's right to judicial review. Judge Kel-

ley made probation part of the sentence, and as Brailey's common law wages are not taxable income according to case law from this very Highest Supreme Court, Brailey cannot in true and good conscience file a State income tax return wherein his common law wages are reported as taxable income, therefore, absent appropriate Federal relief, additional future unlawful-unConstitutional State charges of failure to file shall be forthcoming, as the State Appellate and Supreme Courts apparently have no interest in adjudicating on the issue of jurisdiction before a Federal court does so. A peculiarity in the present State appeal from conviction, relating to the need for High Federal supervision, is the fact that in said present appeal, Brailey has been compelled to raise not only want of jurisdiction by the enforcement court over his person, but also want of jurisdiction over the cause of action itself, for Judge

Kelley rendered a conviction before the Illinois Appellate Court had divested itself of appellate jurisdiction in the appeal from the unfit for trial order by filing the mandate therefore in the court of Judge Urso. The Illinois Appellate Court did file said mandate for the unfit for trial appeal in the enforcement court on the very same day Brailey filed his notice of appeal from the order of conviction and sentencing.

9. The U.S. Court of Appeals for the Seventh Circuit has a duty under law to redress-rectify the wrongs of the U.S. District Court alleged by Petitioner Brailey, per aforementioned fact and argument which indicate that Brailey exhausted his State remedies, and thus that the District Court should have issued the Writ, and reviewed the State record including/especially the State administrative record, and subsequently fashioned an appropriate,

adequate remedy.

WHEREFORE, Petitioner Hughes Brailey prays that this Honorable Supreme Reviewing Court of the United States will grant his Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit in Habeas Corpus Appeal No. 89-1480.

With prayerful respect,

Hughes Brailey

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UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

JUDGEMENT - WITHOUT ORAL ARGUMENT

Date: May 11, 1990

BEFORE: Honorable Richard A. Posner,
Circuit Judge

Honorable John L. Coffey,
Circuit Judge

Honorable Michael S. Kanne,
Circuit Judge

No. 89-1480

HUGHES BRAILEY,

Petitioner-Appellant

v.

JENNY ALDERMAN, Superintendent,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 8947, Judge Marvin E. Aspen

This cause came before the Court for decision on the record from the above mentioned district court.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgement of the District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

Submitted April 27, 1990*

May 11, 1990

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

HUGHES BRAILEY, Petitioner-Appellant	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 89-1480 vs.	)	No. 88 C 8947
JENNY ALDERMAN, Superintendent, Respondent-Appellee.	)	Marvin E. Aspen Judge

O R D E R

Hughes Brailey was found by the state courts of Illinois to be unfit to stand

trial on a charge of failing to file a state income tax return. As a result, Brailey was placed in an inpatient psychological treatment program. He appealed the order of unfitness to the Illinois Appellate Court, raising several claims related to the underlying criminal charge rather than the finding as to fitness. The Appellate Court held that it was without authority to hear claims not directly connected with the issue of fitness to stand trial, and affirmed the order. The Illinois Supreme Court refused permission to appeal.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34-(a); Circuit Rule 34(f). No such statement having been filed, the appeal is submitted on the briefs and record.

Brailey filed petitions for habeas corpus in the state trial court and in the Illinois Supreme Court without success. He then turned to the federal courts with the petition for habeas corpus which is the subject of this appeal, raising the claims the Illinois Appellate Court refused to consider. Judge Aspen denied Brailey's petition on grounds that Brailey had not exhausted his state remedies because his claims could properly be raised in a discharge hearing. On this question of law our review of the district court's decision is de novo, utilizing the same standards as the district court. We affirm the district court's order for the reasons stated in the Judge Aspen's memorandum opinion, a copy of which is attached.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. HUGHES BRAILEY, Petitioner,	)	
v.	)	No. 88 C 8947
JENNY ALDERMAN, Superintendent, Respondent.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Petitioner Hughes Brailey seeks habeas relief pursuant to 28 U.S.C. § 2254 (1982) from an order finding him unfit to stand trial. For the reasons stated herein, the petition is denied.

I. Background

A lengthy exposition of the facts

is not needed. Brailey was indicted for failure to file an Illinois income tax return for the year 1984, as required by Ill.Rev.Stat. ch. 120, § 5-502, and for criminal violations under Ill.Rev.Stat. ch. 120, § 13-1301. During the pretrial proceedings before Cook County Circuit Court Judge Joseph Urso, Brailey's fitness to stand trial was brought into question. Two court-ordered psychiatric examinations were conducted, and both concluded Brailey was unfit to stand trial. On June 3, 1987, Judge Urso found Brailey unfit to stand trial and ordered him to undergo a treatment program. He is currently a resident at the Elgin Mental Health Center.

Brailey appealed the unfitness finding to the Illinois Appellate Court, raising a number of issues, but the court held that the only issue which he could raise on appeal was his fitness to stand trial. On that issue, the Appellate Court

found that the trial court acted well within its discretion in finding Brailey unfit to stand trial. After the Illinois Supreme Court declined review, Brailey sought a writ of habeas corpus in Cook County Circuit Court and an original habeas writ in the Illinois Supreme Court. Both petitions were denied.

On October 21, 1988, Brailey brought the present petition for a writ of habeas corpus. He makes four claims and states he has exhausted his remedies as to all of them. First, he claims that the trial court and the Illinois Department of Revenue have no jurisdiction over him because he is an "unenfranchised natural individual." Second, Brailey charges that the criminal charge against him is void. Third, he claims that the trial court committed an "abuse of process" by failing to review the "quasi judicial administrative procedure and adjudication which arbitrar-

ily procured said charge as a final order in a contested case on the issue of jurisdiction." Finally, Brailey, apparently claiming that he was fit to stand trial, alleges "conspiracy and misrepresentation by forcibly appointed public defenders." (Petitioner's Petition 4-6). The merits of these issues need not be addressed, as it is clear that Brailey has not exhausted his state court remedies.

II. Pre-Trial Habeas Relief

Under 28 U.S.C. § 2241(c)(3) (1982), the federal courts have jurisdiction to grant writs of habeas corpus prior to trial to petitioners in state custody. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 488, 93 S.Ct. 1123, 1126 (1973); United States ex rel. Parish v. Elrod, 589 F.2d 327, 328 (7th Cir. 1979). However, because of judicial principles of comity, a petitioner generally must ex-

haust the state remedies available to him before seeking habeas relief in federal court, and this is true whether he seeks relief before or after trial. Neville v. Cavanagh, 611 F.2d 673, 675 (7th Cir. - 1979), cert. denied, 446 U.S. 908, 100 S.Ct. 1834 (1980); Parish, 589 F.2d at 328 -29. Thus, despite the acknowledged power to grant pre-trial habeas relief, federal courts will not usually consider matters that can be decided at trial in the state court. Accordingly, "federal habeas corpus does not lie, absent "special circumstances" to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgement of conviction by a state court." Braden, 410 U.S. at 489, 93 S.Ct. at 1127. Federal courts may be somewhat less reluctant to grant habeas relief if the petitioner is seeking to compel a trial, rather than litigate a matter in a federal forum before trial. See id. at 489

-90, 93 S.Ct. at 1127. But even in these cases, exhaustion is required. Id. at 490, 93 S.Ct. at 1127.

In the present case, Brailey's first three claims are affirmative defenses to his state tax charge; because Brailey was found unfit to stand trial, they have not yet been adjudicated. Thus, under the general rule, we cannot consider these claims, since the state court has not had a chance to consider them. But because the court found Brailey unfit to stand trial, it is not clear that he will have a trial any time soon. The Illinois Criminal Code, however, provides another avenue through which Brailey may litigate the claims that he seeks to advance in this Court. Under Ill.Rev.Sta. ch. 38, § 204-23 (1987), a defendant who has been found unfit can at any time demand a discharge hearing. At the discharge hearing, which is held before the trial court without a jury, an

unfit defendant "may introduce evidence relevant to the question of [his] guilt of the crime charged." Id. ¶ 104-25(a). If the evidence does not prove the defendant guilty beyond a reasonable doubt, the court enters a judgement of acquittal, although the state may request that the defendant be civilly committed. Id. ¶ 104-25 (b). If the defendant is not acquitted, 1/ he is remanded for further treatment, not to exceed certain time limits depending on the severity of the crime. Id. ¶ 104-25-(d). If the court fails to acquit, the defendant may appeal such judgement. Id. ¶ 104-25(f). See generally Paull, S.B. 133: The Near Resolution of a Major Problem: Fitness in the Criminal Law, 56 Chi-Kent L.Rev. 1107, 1117 (1980).

1/ The discharge hearing is an "innocence only" hearing; the court cannot technically find a person guilty. The question of guilt is decided only at trial, if one is ever held. See People v. Rink, 97 Ill.2d 533, 543, 455 N.E.2d 64, 69 (1983).

It is not clear from the language of the statute whether at the discharge hearing Brailey can raise the affirmative defense that he has raised in his habeas petition. However, at least one Illinois court has considered a matter involving Miranda warnings at a discharge hearing, see People v. Burt, 142 Ill.App.3d 833, 837, 492 N.E.2d 233, 237 (2d Dist. 1986), and we see no reason why the state court would not consider Brailey's three affirmative defenses. Moreover, in the interest of comity and federalism, we must presume that the state court has the same solicitude for Brailey's rights as we do, see Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct 1198, 1203 (1982), and that it will give his claims the consideration they deserve.2/

2/ If the state court does not consider these claims, and Brailey remains in custody, he may well have a federal habeas claim at that time.

Because Brailey has not requested a discharge hearing, we conclude that he has not exhausted his state remedies.

We must therefore determine if there are "special circumstances" that would allow us to consider these claims, even though Brailey has not exhausted state remedies. Although Brailey's pro se complaint and his accompanying briefs are not argued in terms of special circumstances, he emphasizes one reason in particular why we should consider his claim. He argues that the Illinois Appellate Court erred when it only considered the trial court's order finding him unfit to stand trial and did not consider the affirmative defenses he raises here. Brailey contends that Ill.Rev.Stat. ch. 38, ¶ 104-16(e) (1987), which makes a finding of unfitness a final order subject to appeal, requires the appellate court to consider all matters that he had raised below. We

doubt that this is true, but even if it is, habeas relief does not lie merely to correct errors of state law. See 28 U.S.C. § 2241(c)(3) (1982) (habeas relief lies only if petitioner is "in custody in violation of the Constitution or law or treaties of the United States"); Jones v. Thieret, 846 F.2d 457, 460 (7th Cir. 1988) Accordingly, we must reject Brailey's request for habeas relief on his first three claims.

We need not decide whether Brailey has exhausted his state remedies on his fourth claim, which concerns Judge Urso's finding that Brailey was unfit to stand trial. Even if the state remedies on the fourth claim are exhausted, 3/ it is clear

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3/ It appears that Brailey did exhaust his state remedies on the fourth claim by appealing the finding of unfitness. Note that a discharge hearing would not provide any relief on the fourth claim; the discharge hearing does not consider the finding of unfitness, but only whether the defendant is innocent of the crime charged.

that Brailey has not exhausted his remedies on the first three. Thus, at a minimum, Brailey's petition contains a mixture of exhausted and unexhausted claims and therefore must be dismissed in toto. Varnell v. Young, 839 F.2d 1245, 1248 (7th Cir. 1988); United States ex rel. Chauser v. Shadid, 677 F.2d 591, 593 (7th Cir. 1982).

III. Conclusion

Brailey has not shown that he has exhausted the available state court remedies, nor shown special circumstances sufficient to allow us to exercise our pretrial habeas corpus jurisdiction. Accordingly, the petition for a writ of habeas corpus is denied. It is so ordered.

MARVIN E.ASPEN
United States District
Judge

DATED 2/ 22 / 89

FOURTH DIVISION
June 9, 1988

Notice

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

87-2723

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the) Circuit Court) of Cook County.
Plaintiff-Appellee,	)
v.	)
HUGHES BRAILEY,	) Honorable) Joseph J. Urso,
Defendant-Appellant.	) Judge Presiding.

ORDER PURSUANT TO SUPREME COURT RULE 23

JIGANTI, P.J.

Defendant, Hughes Brailey was indicted for the failure to file an Illinois tax return for 1984, and the trial court found him unfit to stand trial. From this order,

we granted defendant's permission to file a late notice of appeal. Defendant contends on appeal that the trial court erred by appointing counsel to represent him over his objection, that jurisdiction properly lies in an administrative agency and that therefore the trial court lacks jurisdiction to entertain the indictment, and that the trial court erroneously failed to rule in his favor on the merits of pleadings filed in an administrative proceeding.

The State contends that Supreme Court Rule 604(e) (107 Ill. 2d R. 604(e)), which permits appeals from an interlocutory order determining that defendant is unfit to stand trial, limits the scope of such appeals to issues relevant to the question of fitness. We agree.

Pursuant to a grand jury investigation, defendant was indicted for the willful failure to file an income tax return

for 1984 in that he was a resident of the State in 1984, was required to file a Federal tax return for such year, but then willfully failed to file an Illinois return. (Ill. Rev. Stat. 1983, ch. 120, pars. 5-502, 13-1301.) During the course of the pretrial proceedings, counsel was appointed to represent defendant over his objection. Nonetheless, defendant continued to act on his own behalf by making objections and engaging in argument, while also accepting the assistance of counsel on occasion.

Prior to trial the assistant public defender indicated to the court that he had serious doubts about defendant's ability to cooperate in his own defense and that defendant could not answer any of defense counsel's questions. In particular, the assistant public defender was concerned that although defendant was able to intelligently articulate his philosophical

views concerning taxation, he nonetheless appeared unable to effectively address the elements of the crime with which he was charged and could not assist in his defense. On this basis, defense counsel requested a psychiatric examination concerning defendant's fitness to stand trial. The trial court invited defendant's comment on the request of defense counsel. In response, defendant, as he had done throughout pretrial proceedings, engaged in lengthy oratory concerning his views that the State should proceed against him, if at all, in administrative proceedings and that the trial court lacked jurisdiction. After several unsuccessful attempts exercised with great patience, the court was able to briefly draw defendant's attention to the issue of a psychiatric examination. Defendant's only inquiry in this regard was whether such was a condition of his bond. In response the trial

court asked defendant whether he intended to see the psychiatrist. When defendant replied that he intended to do so, the trial court said that such arrangement was satisfactory, and the conditions of the bond would not be affected.

By letter, Dr. Albert H. Stipes of the Psychiatric Institute of Cook County reported that defendant was marginally in touch with reality and was not fit for trial. At the request of the State, defendant was reevaluated. Based on an interview with defendant and a review of his medical records, Dr. Mathew S. Markos also of that institute rendered the opinion that defendant suffered from mental illness, and that he was not mentally fit to stand trial. Dr. Markos opined that defendant understood the charges against him but was unable to assist in his defense. Dr. Markos indicated that if defendant would accept treatment, including the use

of prescribed, antipsychotic medication, he could be fit for trial within a year, but Dr. Markos doubted that defendant would cooperate in a program of treatment. Based on such expert evaluation and its own observation of defendant's behavior during several pretrial proceedings occurrig over many months, the trial court found defendant unfit to stand trial but capable of being restored to fitness within a year with proper treatment. It then ordered defense counsel to find a suitable out-patient program for defendant so that, if possible, in-patient treatment could be avoided.

Where, as here, defense counsel makes a good-faith representation to the court that his client is not in touch with reality concerning the elements of the offense charged, a **bona fide** doubt of defendant's fitness to stand trial has been raised, and it is a proper exercise of the court's

jurisdiction to resolve such doubt. (People v. Nesbitt (1977), 49 Ill. App. 3d 533, 364 N.E.2d 553.) The critical inquiry is whether defendant understands the nature and the purpose of the proceedings against him and is able to assist in his defense. (Ill. Rev. Stat. 1985, ch. 38 par. 104-10.) Concerning the fitness to stand trial, the trial court's determination will not be disturbed absent a clear showing of an abuse of discretion. See People v. Lucas (1986), 140 Ill. App. 3d 1, 487 N.E.2d 1212.

Here, as noted by the trial court, defendant was exclusively focused on his belief that a separate administrative proceeding, which also apparently dealt with his tax liability, took precedence over the instant criminal proceeding and that his pleadings in the administrative proceeding conclusively demonstrated not only that the trial court lacked jurisdiction

to entertain the criminal indictment lodged against him but also that he was entitled to judgement in his favor. Such fixation was so overriding that it eclipsed defendant's attention to any other matter including the issue of his fitness to stand trial. This inability to deal with the matter at hand is also clearly demonstrated by the **pro se** briefs which defendant has filed in this court. In them defendant has set forth no basis upon which a court of review could find that the trial court abused its discretion in adjudicating defendant unfit to stand trial. To the contrary, defendant argues that he has an absolute right to appear **pro se**, that he was entitled to judgement in the instant criminal proceeding based on his pleadings before an administrative tribunal, and that the trial court's jurisdiction is limited to review of the order and findings of the administrative a-

gency. The arguments presented support the trial court's determination that defendant is unable to assist in his defense to the criminal offense charged. Furthermore, expert psychiatric evidence demonstrated that defendant's fixation and loss of touch with reality were the result of mental illness which was treatable. Until such treatment was successfully completed, however, both physicians agreed that defendant was unfit to stand trial. Under the circumstances, we cannot say that the trial court abused its discretion.

In light of the foregoing, the order of the circuit court of Cook County is affirmed.

Order affirmed.

LINN and McMORROW, JJ.